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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 340

DOEHLER METAL FURNITURE CO., INC.,
Petitioner,

v.

LINDSAY C. WARREN, Comptroller General of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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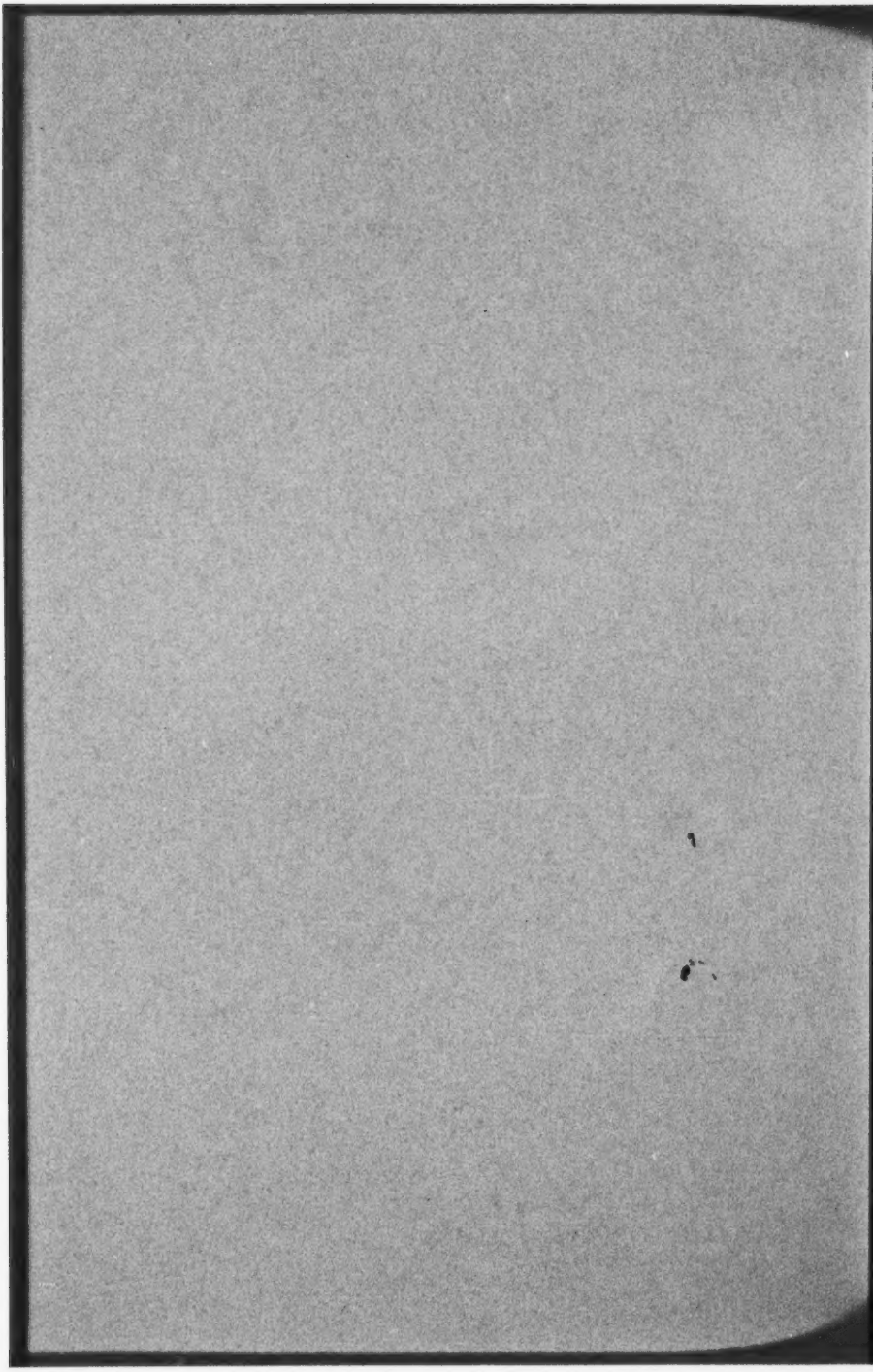


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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Doehler Metal Furniture Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled cause on June 15, 1942 (R. 4), which approved the judgment of the District Court of the United States for the District of Columbia dismissing the complaint herein.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia (R. 10) was handed down on June 15, 1942, and reported in 75 App. D. C., ..., and 129 Fed. (2d), ..43..

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on June 15, 1942 (R. 14). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C., 347, 43 Stat. 938).

Statute Involved.

This suit is brought under and in accordance with the Declaratory Judgment Act of June 14, 1934, as amended in 1935 by Pub. Law 407, 74th Congress, and is Section 274D of the Judicial Code, c. 512, 48 Stat. 955. As amended, the pertinent provisions thereof are as follows:

> Section 274D. (1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power, upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

Questions Presented.

1. Whether the Comptroller General is suable under the Declaratory Judgment Act?
2. Whether, the facts as alleged by petitioner, appellant below, being admitted by the motion to dismiss, petitioner is entitled to have a declaration of the applicable law as prayed?

Grounds for Applying for Writ.

1. The questions presented are of general importance. Tens of thousands of contracts with the United States, involving many millions of dollars, will develop hundreds of disputes and actual controversies between the contractor and the Comptroller General of the United States. Most of such controversies will arise over questions of the applicable rule of law to an undisputed factual condition.
2. The questions presented are of substance relating to the application of a statute of the United States, which have not been, but should be, settled by this court. The case is a simple one; designedly so. It is a case of first impression.
3. The rights of the petitioner to have from the court a declaration of the applicable law to an undisputed set of facts, which declaration would avoid the expense and delay of a suit for the recovery of a given sum of money are at issue.

Statement.

Subject to the interpolations within parenthesis and printed in italics, we adopt the statement of the case as set forth in the opinion of the United States Court of Appeals for the District of Columbia.

Plaintiff (appellant) had a contract with the Government to furnish the War Department supplies in the gross amount of $92,000 plus. The contract provided that if plaintiff failed to make deliveries by specified times, the Government could terminate plaintiff's right to proceed, make substitute purchases, and hold plaintiff liable for the "excess cost occasioned the Govern-

ment." The Government accepted delivery on a little less than $9,000 worth. The cancellation of the contract by the Government (which action is assumed to have sufficient cause) (*Such presumption does not attend a motion to dismiss, but is rather a matter of defense under appropriate circumstances.)* left supplies to be obtained which would have cost it $82,607.77, under the contract with plaintiff. The Comptroller General in his settlement of claim has determined that it cost the Government $104,290.19 to obtain the remainder of the supplies. Thus the excess cost which plaintiff owes as damages is $21,682.42. The plaintiff alleges that the actual cost to the Government was $94,881.57, and therefore, the excess cost should be $12,273.80, which is $9,408.62 better from its viewpoint. (*Such actual cost as alleged must be and is admitted to be true by the motion of Comptroller General to dismiss the complaint.*)

Specifications of Errors to be Urged.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that there is no actual controversy between the parties, whether of law or fact.
2. In holding that "The judiciary has confined its control over the Comptroller General, so far as we know, to writs of mandamus and mandatory injunctions."
3. In holding that "the only jurisdiction the District Court has ever had over the actions of the Comptroller General is that of mandamus."
4. In affirming the judgment of the District Court below.

Reasons for Granting the Writ.

While the Comptroller General is a government official, clothed with the habiliments of great power, his acts in con-

travention of law, or in violation of correct legal principles applicable to the subjects with which he deals, are subject to review by courts of law. *(Miguel v. McCarl, Comptroller General,* 291 U. S. 442, 455, 456.)

Nor, is a suit against the Comptroller General a suit against the United States. *(Miguel v. McCarl, Comptroller General,* 291 U. S. 442, 455, 456.)

The Declaratory Judgment Act and the new Rules of Civil Procedure supply an appropriate, useful, and effective opportunity for the determination of the "rights and other legal relations" of citizens "in cases of actual controversy" in the dealings of the citizen with the Comptroller General of the United States. *(Rule 57, Rules of Civil Procedure for the District Courts of the United States.)* (H. Rept. 1264, 73d Cong. 2d Sess.)

The procedure of mandamus is abolished. *(Rule 81, (b), Rules of Civil Procedure for the District Courts of the United States.)*

As a modern substitute for the cumbersome procedure of mandamus against officials, and, as a substitute for frequently long delayed and expensive direct action by suit against the government of the United States, Congress passed the Declaratory Judgment Act, which, in appropriate cases may be used to determine the legal relations of the parties dealing with such subjects. This Court has appropriately implemented such law by Rule 57 of the Rules of Civil Procedure.

It matters not that another adequate remedy exists.

This Court has broadly interpreted the scope, function, and application of the Declaratory Judgment Act. *(Aetna Life Insurance Co. v. Haworth,* 200 U. S. 227, 240.)

This Court has recently noted probable jurisdiction and accepted for review two cases, both of which were brought under the Declaratory Judgment Act, and, one of which includes as defendant an official of the government of the United States. *(Filburn v. Helke and the Secretary of Agriculture, No. 59...,* and *The Washington Terminal Co. v. F. E. Boswell, et al., No. 28....)*

Any doubt that the Declaratory Judgment Act may be used under appropriate circumstances to question the acts of officials of the United States is adequately disssolved by remembering that after the passage of the law and despite comprehensive provisions of statutes relating to the determination, assessment, and collection of Federal taxes, it came to the attention of Congress that this law was being used to question the validity of revenue legislation. Whereupon, the law was amended in 1935, *(Pub. Law 407, 74th Cong.)* by the insertion of the words: "except with respect to Federal taxes."

This law has recently been successfully invoked by the United States to determine its own rights and legal relations. *(United States v. Golden Gate Bridge and Highway District of California,* 37 Fed. Supp. 595.)

To say that government officials may use this procedure to challenge the acts of the citizen, leaving to him only the right to defend, and, at the same time to hold that its provisions may not be called into action by the citizen to challenge the acts of governmental officials is to defeat the objective of the law itself.

The Comptroller General is not beyond the jurisdiction and direction of the courts of justice in the discharge of his important duties, when, as in this case, his acts are appropriately brought to the attention of the judiciary.

A case of "actual controversy" is here presented as between petitioner and the respondent, Comptroller General. Such arises not alone over the sum to be properly charged against respondent, but under the admitted facts as disclosed by this record an "actual controversy" exists as to the correct rule of law to be applied to the admitted facts. To declare the law is the peculiar function of the judiciary.

Where a party is entitled to the benefit of a contract, and can save himself from loss arising from a breach thereof, it is his duty to do so. *(Wicker v. Hoppeck,* 75 U. S., 6 Wall. 94.)

The damages must be based upon the *actual loss,* being the difference between the actual expenditures laid out and the sum called for in the contract. *(III Williston On Contracts,* 2401.) Such difference as shown by the pleadings and the admitted facts in this case is $12,273.80 instead of $21,682.42, as charged and claimed by the Comptroller General.

The pleadings show (Exhibit A, R. 5.) that the Comptroller partially recognizes the sound principle as to the duty of the injured party to *reduce his cost, or damage.*

Stating the account under correct rule of law is the function of the Comptroller General. To advise him what the correct rule of law is under the admitted facts is the province of the judiciary. Such relief was asked by petitioner

under the provisions of the Federal Declaratory Judgment Act.

To deny the declaration of the correct rule of law as to what are "excess costs" under the admitted facts is to unwarrantably restrict the usefulness of declaratory procedure. Petitioner is entitled to have such declaration. When had all issues will be readily dissolved as between it and the Comptroller General. The objects of the declaratory law will have been attained. The rightful interests of all concerned will have been promptly discovered and adequately preserved under the protective processes of the laws of the land by its courts of justice.

Under the decision below the petitioner is deprived of the opportunity for a judicial declaration of its rights under the Declaratory Judgment Act and Rule 57 of the Rules of Civil Procedure adopted by this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia should be granted.

August 17, 1942.

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v.

LINDSAY C. WARREN, COMPTROLLER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court delivered no opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 10) is reported in 129 F. (2d) 43.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered June 15, 1942 (R. 14). The petition for a writ of certiorari was filed August 27, 1942. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a Government contractor may maintain an action for a declaratory judgment against the Comptroller General in regard to a disputed item in the settlement by the Comptroller General of a claim against the contractor.

STATUTES INVOLVED

The Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955, as amended by Section 405 of the Act of August 30, 1935, c. 829, 49 Stat. 1027 (28 U. S. C., § 400), provides in part:

> In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

Section 236 of the Revised Statutes, as amended by Section 305 of the Act of June 10, 1921, c. 18, 42 Stat. 24 (31 U. S. C., § 71), provides:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

STATEMENT

On December 22, 1938, the petitioner was awarded a Government contract, in the gross amount of $92,391.80, for the delivery of certain supplies to the War Department (R. 3). Article 5 of the contract provided that upon the failure or refusal of the contractor to make deliveries of the materials or supplies within the time specified, the Government could by written notice terminate the right of the contractor to proceed, purchase similar materials or supplies in the open market, or secure their manufacture and delivery by contract or otherwise, and hold the contractor and his sureties liable "for any excess cost occasioned the Government thereby" (R. 3–4). The Government accepted delivery of slightly under $9,000 worth of supplies, but thereafter declared the contractor in default under the provisions of Article 5 and terminated the contractor's right to proceed (R. 3, 6). The undelivered supplies called for by the contract were then obtained by the Government under a new contract, awarded to the Equipment & Furniture Corporation after readvertising (R. 6). The Comptroller General in his Notice of Settlement of Claim, directed to petitioner, determined that it had cost the Government $104,290.19 to obtain the supplies not delivered by petitioner (R. 4, 6) and that such supplies would have cost the Government $82,607.77 under the contract with petitioner, so that the excess cost was $21,682.42.

The Comptroller General then allowed petitioner credit for supplies delivered under its contract and for certain amounts due to it under other transactions, and finally determined that the petitioner was indebted to the United States in the sum of $12,711.85 (R. 7–8).

The petitioner, dissatisfied with the settlement of claim, brought an action for a declaratory judgment against the Comptroller General (R. 3). Petitioner did not and does not now challenge the right of the Government to terminate its contract, obtain the supplies elsewhere and charge it with the added cost. Petitioner disputed only the amount of its liability. The complaint alleged that the cost to the Government of the supplies obtained under the readvertised contract was $94,-881.57 instead of $104,290.19 as stated in the Comptroller General's settlement, and that therefore the excess cost for which it was liable under the contract was $12,273.80, $9,408.62 less than the $21,-682.42 determined by the Comptroller General (R. 4). The reason and nature of the dispute were nowhere stated.[1] The complaint simply al-

[1] We are informed by the Assistant Comptroller General that the difference of some $9,000 between the "excess cost" figures of the Comptroller General and those of the petitioner arises from a dispute as to whether there should be allowed to petitioner the amount of liquidated damages collected from the completing contractor, the Equipment & Furniture Corporation, by reason of certain delays in the delivery of material. The Comptroller General did not allow such liquidated damages in determining the excess

leged that the dispute existed and that the Comptroller General refused to accept "the applicable rule of law" (R. 3–4). The complaint then prayed (1) that the court declare the excess cost to be "the difference between the contract price and the sum actually paid out in completing the same"; (2) that the court declare the amount of such excess cost in accordance with petitioner's contention; and (3) that the court enter "an appropriate order for the release" of the sum of $9,408.62 (R. 4).

The district court granted respondent's motion to dismiss the complaint. The court below affirmed the judgment of the district court (R. 10, 14).

ARGUMENT

The court below correctly held that it had no power to review by a declaratory judgment the action of the Comptroller General in the settlement of petitioner's claim. Prior to the enactment of the Declaratory Judgment Act the courts would not have reviewed his action in this respect by mandamus or injunction, not because those remedies were procedurally defective, but because the courts would not interfere with or set aside an exercise of executive or administrative discretion by an officer acting within his jurisdiction. The Declaratory Judgment Act does not enlarge the power or duty of the courts to review administrative action but simply supplies a new procedural

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cost to be charged against petitioner. See Appendix, *infra*, p. 10.

device for adjudicating the cases and controversies that the courts formerly would hear. These two controlling principles are well settled and were correctly applied below. Consequently, there is no occasion for further review by this Court.[2]

1. Prior to the enactment of the Declaratory Judgment Act it was well settled that a complaint like petitioner's furnished no basis for relief against the Comptroller General. Congress has committed to the General Accounting Office the settlement and adjustment of "all claims and demands whatever" by or against the Government. Rev. Stat. § 236, as amended by Section 305 of the Act of June 10, 1921, c. 18, 42 Stat. 34 (31 U. S. C., § 71). A party whose claim has been rejected by the accounting officers is free to pursue his remedy against the United States by an appropriate action to secure any money due (*Longwill* v. *United States,* 17 C. Cls. 288; see *St. Louis, Brownsville & Mexico Ry. Co.* v. *United States,* 268 U. S. 169, 174) and relief also may be obtained against the Comptroller General by mandamus or injunction[3] if the payment is so plainly owing that his

[2] There is no conflict of decisions, but none could arise because the Comptroller General may be sued in his official capacity in the federal courts only in the District of Columbia. Cf. *Butterworth* v. *Hill*, 114 U. S. 128.

[3] Rule 81 (b) of the Federal Rules of Civil Procedure abolishes the writ of mandamus, and provides that the "relief heretofore available by mandamus * * * may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

duty to authorize payment is merely ministerial. *Smith* v. *Jackson*, 246 U. S. 388; *McCarl* v. *Cox*, 8 F. (2d) 669 (App. D. C.); see *Miguel* v. *McCarl*, 291 U. S. 442, 456; Mansfield, *The Comptroller General* (1939), 110 *et seq.* There is no authority, however, for any other type of judicial review or supervision of the Comptroller General's settlements. Mansfield, *Administrative Finality and Federal Expenditures* (1938), 47 Yale L. J. 603, 614–617; Mansfield, *Judicial Review of the Comptroller General* (1935), 20 Cornell L. Q. 459, 470. And relief by mandamus or injunction plainly does not extend to a case like the present, which, as the court below pointed out, apparently involves the review either of issues of fact or of questions of law that called for the exercise of discretion and judgment by the Comptroller General. *United States ex rel. Carroll Electric Co.* v. *McCarl*, 8 F. (2d) 910 (App. D. C.); *McCarl* v. *Rogers*, 48 F. (2d) 1023 (App. D. C.); *Brunswick* v. *Elliott*, 103 F. (2d) 746 (App. D. C.). This is but an application of the general rule that mandamus or injunction will not lie "to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in respect of either" (*Wilbur* v. *United States*, 281 U. S. 206, 218). See also *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324–325; *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; cf. *Work* v. *Rives*, 267 U. S. 175. In such cases mandamus and injunction are unavailable not because

there are procedural difficulties or because the law or equity court could not fashion a remedy; they are unavailable because the courts will not interfere in the decisions of administrative and executive officers and thus upset the normal operations of the Government. *Decatur* v. *Paulding*, 14 Pet. 497; cf. *Adams* v. *Nagle*, 303 U. S. 532.

2. Petitioner conceded below (R. 12), and appears to concede here, that it could not have obtained a writ of mandamus or an injunction, but urges that it is entitled to relief under the Declaratory Judgment Act because there is an actual controversy between it and the Comptroller General. But assuming that such a controversy exists,[4] nevertheless no relief can be awarded under the Declaratory Judgment Act because the controversy is, as we have shown, the kind of controversy in which the courts will not interfere. The operation of the Declaratory Judgment Act is procedural only. *Aetna Life Ins. Co.* v. *Haworth*, 300

[4] It may be questioned whether the "actual controversy" required by the Declaratory Judgment Act can be made out in this case. The controversy, under that Act, must be "definite and concrete, touching the legal relations of parties having adverse legal interests." See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240; Borchard, *Declaratory Judgments* (1941 ed.), 40 *et seq.* By failing to show how the $9,000 variance in the estimate of excess cost arose, or upon what dispute of fact or law it is based, the record here falls short of presenting a definite and concrete controversy between petitioner and the Comptroller General. See *Agnew* v. *Hoage*, 99 F. (2d) 349 (App. D. C.).

U. S. 227, 240. The Act does not broaden the scope of judicial supervision over the executive and administrative branches or authorize the courts to control to any larger extent than before the action of executive and administrative officers. *Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 101 F. (2d) 426 (App. D. C.), affirmed on other grounds, 306 U. S. 56; *Love* v. *United States*, 108 F. (2d) 43 (C. C. A. 8), certiorari denied, 309 U. S. 673. The very objections which barred judicial review of the action of the Comptroller General on petition for mandamus and injunction also forbid interference on a complaint for declaratory relief.

3. The denial of the petition will work no hardship upon petitioner. The issues raised by it may be fully litigated either in appropriate proceedings brought by petitioner under the Tucker Act whenever it claims a net balance due in its favor, or as a defense in any suit brought by the United States to enforce its claim for the excess cost.[5]

[5] The United States is not a party; hence there is no question here as to whether the petitioner could obtain declaratory relief against the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1942.

APPENDIX

In a letter dated March 29, 1941, from the Assistant Comptroller General to the Attorney General in regard to the suit by Doehler Metal Furniture Co., Inc., against the Comptroller General, appear the following paragraphs (at page 3):

> The completion contract with the Equipment & Furniture Corporation (No. W–950–qm–1605, dated April 18, 1939) contained a liquidated damage clause, and by reason of certain delays in delivery of material, liquidated damages in the amount of $9,119.75 were assessed against the contractor. Payment was made under that contract on voucher No. 10508 of the July, 1939, account of W. M. Dixon, Lieutenant Colonel, Finance Department (pages 3–1 to 3–11 of the certified copies) in the net amount of $94,887.57.
>
> It would appear that the purpose of the plaintiff's suit is to obtain a declaration by the court to the effect that the computation of excess cost to the Government under the contract with the Equipment & Furniture Corporation is erroneous, and that there should be allowed to the plaintiff the amount of liquidated damages collected from the completing contractor—$9,119.75 (erroneously stated in the complaint to be $9,408.62)—because of its failure to perform within the time specified in the completion contract.

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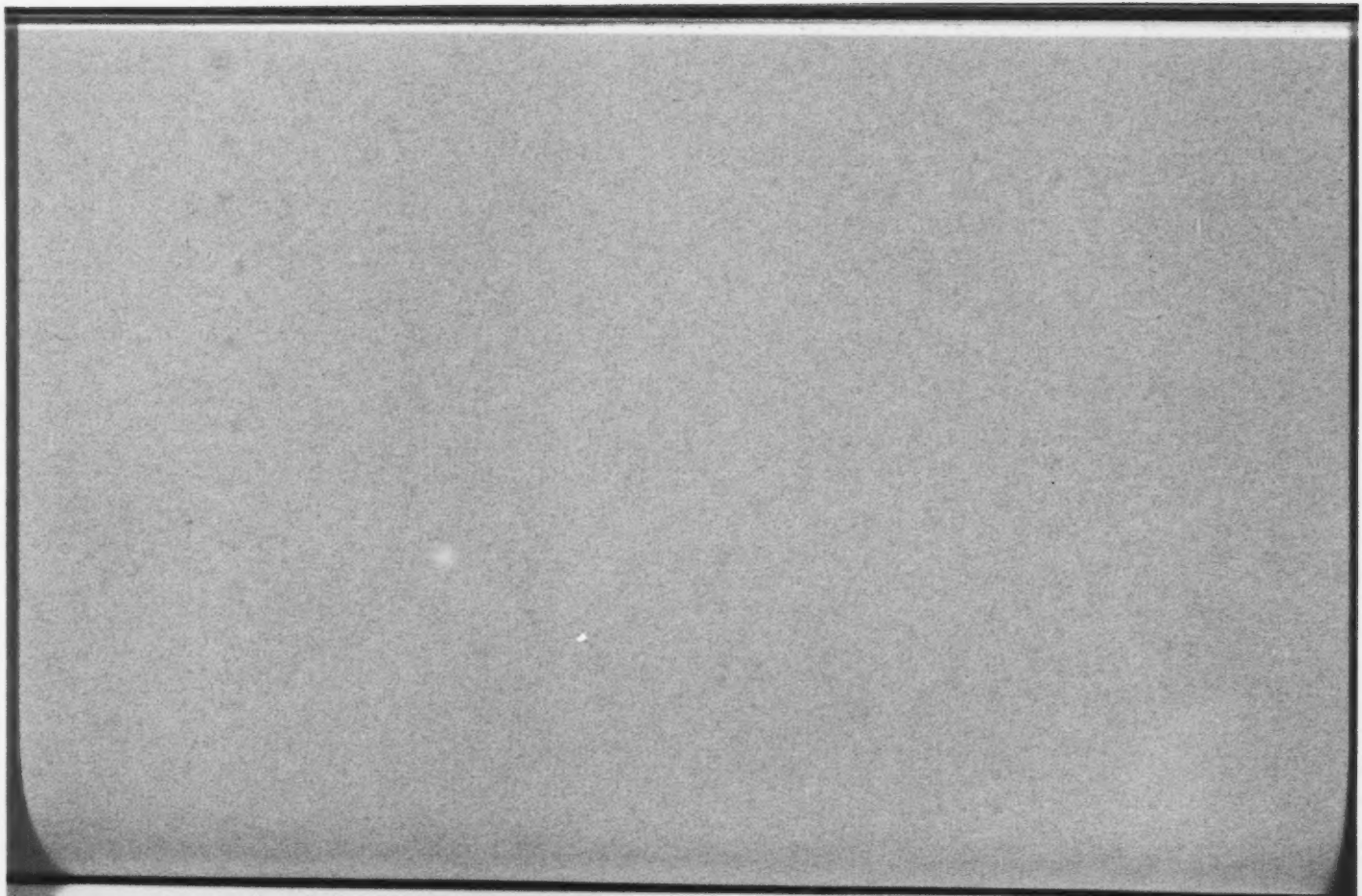
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REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

In its opinion, the United States Court of Appeals for the District of Columbia said:

> "The Comptroller General in his settlement of claim has determined that it cost the Government $104,290.19 to obtain the remainder of the supplies. Thus the excess cost which plaintiff owes as damages is $21,-682.42." (R. 10.)

This statement is flatly contradicted by the Solicitor General by his quotation from a letter from the Assistant Comptroller General to the Attorney General wherein it is admitted that the cost to the Government was "in the net amount of $94,887.57" instead of $104,290.19. (Appendix to brief of Solicitor General, p. 11.)

In other words, it is admitted that the Comptroller General acting as the responsible accounting officer of the government of the United States has, as alleged by petitioner, set up a fictitious charge against this petitioner whereby he proposes to unjustly enrich the government of the United States at the expense of this petitioner for a sum of $9,119.75 never expended as excess cost or otherwise by the government of the United States. Thus, the admitted facts as set forth by the Solicitor General present an actual variance between fictitious and actual costs; an "actual controversy" to be determined by the use of the Declaratory Judgment Act of 1934. To suggest, as the Solicitor General does, that petitioner be relegated to suit at law under other procedure is to urge that congressional efforts to modernize judicial processes be forgotten, and, the decisions of this Court be ignored.

Petitioner approaches this Court in the confident belief that it will not approve unjust enrichment whether it be claimed on behalf of the government of the United States or others.

For this reason, alone with others urged, petitioner respectively submits that the writ of certiorari should be granted as prayed.

September, 1942.

NATHAN BOONE WILLIAMS,
1010 Vermont Avenue,
Washington, D. C.
Counsel for Petitioner.

OCT 31 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942.

No. 340.

DOEHLER METAL FURNITURE CO., INC.,
Petitioner,

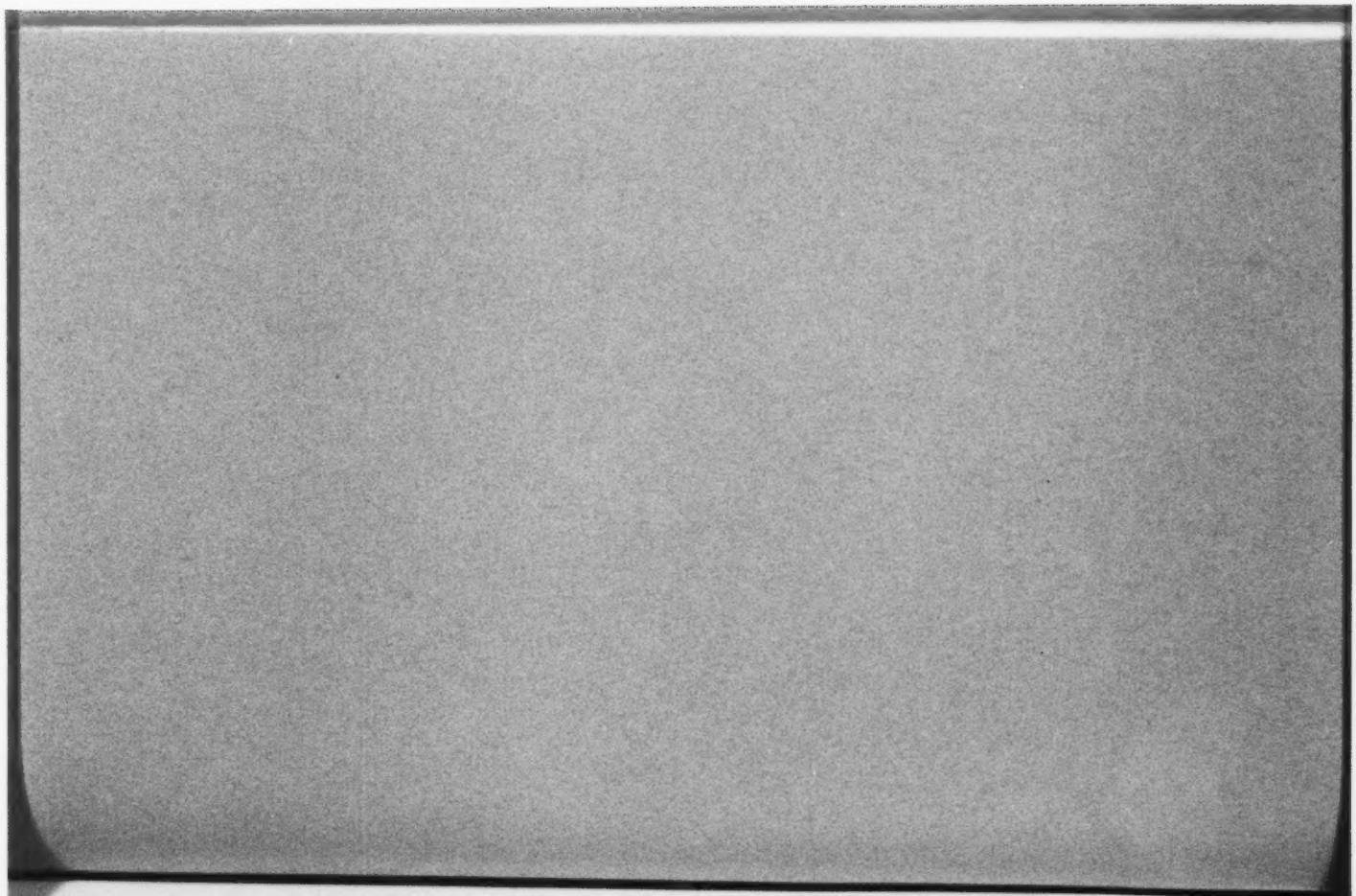
v.

LINDSAY C. WARREN, Comptroller General
of the United States,
Respondent.

PETITION FOR REHEARING.

NATHAN BOONE WILLIAMS,
1010 Vermont Avenue,
Washington, D. C.,
Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING



IN THE

Supreme Court of the United States

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DOEHLER METAL FURNITURE CO., INC.,
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v.

LINDSAY C. WARREN, Comptroller General
of the United States,
Respondent.

PETITION FOR REHEARING.

Comes now counsel for the Petitioner and moves the Court for a rehearing as to the action of the Court in denying the petition for a writ of certiorari as in this cause prayed, and, for cause shows:

Public Importance.

The issues bound up in this record go to the foundation of our American political and judicial system. They embrace the questions for which a global war now engages our thought, consumes our substance, and, takes our lives. Such are now here presented for the first time. They are vital. They are fundamental.

It is of slight pecuniary interest to Petitioner, a corporation, and, whose officers are charged with the trust of conserving and protecting its property rights, as to whether it may have such rights determined by the courts under the provisions of the Declaratory Judgment Act, or whether they are determined in other proceedings authorized by law.

However, it is of the highest public importance to have the reasoned decision of this Court upon the questions presented by this record.

In effect, the denial of the petition for a writ of certiorari in this cause gives affirmative approval and effect to certain conclusions.

Among such conclusions are:

1. That the government of the United States may lawfully enrich itself by means of charges for alleged expenditures never made, and, collect such charges from the citizen dealing with it.
2. That the acts of the Comptroller General in determining applicable principles of law in the statement and settlement of accounts and claims with and against the United States may not be challenged or reviewed by any court, save incidentally and collaterally by suit against the United States itself.
3. That it is not permissible to challenge and have review by the courts of the legality of acts of the Comptroller General of the United States by the means and use of the Declaratory Judgment Act.
4. That despite the use of this Act by the government of the United States to "declare rights and other legal relations" as between itself and citizens, such law and procedure may not be used by the citizen to question the legality of the acts of governmental officials,

particularly, the acts of the Comptroller General of the United States.

5. That the usefulness of declaratory procedure for "the cheapening, expediting, and simplfying of the judicial process itself" is by the action of the Court herein greatly restricted.

There are no facts in issue. All facts are admittedly true as alleged by Petitioner; accepted by the pleadings of Respondent, and, abundantly verified by the brief of Respondent, Comptroller General, as presented by the Solicitor General of the United States.

The Respondent, Comptroller General, by his statement of account as between the government and this Petitioner, allowed a credit of more than $1,000.00 in direct contradiction of his asserted claim of a deficiency of more than $9,000.00, whereby his office admits the correctness of the rule of law as claimed by this Petitioner. *(Exhibit A to complaint of Petitioner, and the Appendix to brief of Solicitor General.)*

To permit the application of any other than this just and lawful rule in the statement of account in question can result but in unjust enrichment to the government of the United States by means of charges for alleged expenditures never made. Such unjust enrichment may be no more lawfully permitted in the determination of the rights and legal relations of the citizen on the one hand and the acts of the Comptroller General on the other with respect to such matters with which he has certain lawful duties, than in cases where individual citizens have controversies with each other.

Mr. Justice Douglas is quoted as saying:

"I'm the kind of conservative who can't get away from the idea that simple honesty ought to prevail in the

financial world." *(Saturday Evening Post, October 17, 1942.)*

Counsel contends for "simple honesty" in the relations of government with the citizen; for intellectual integrity in the interpretation and application of the laws of the land, and, for continuing improvement in the administration of justice.

"Justice" wrote Alexander Hamilton in the *Federalist*, "is the end of government. It is the end of civil socity. It ever has been, and ever will be pursued until it is obtained, or until liberty be lost in the pursuit."

This Court, we respectfully submit, has said to this Petitioner, and, to all the thousands, who under war conditions must of necessity deal with the government of the United States, that the Comptroller General will apply his own conceptions of law to their contracts with the government, and, that however erroneous such legal concepts and principles may be believed to be, there is no way to challenge them save by suit in the Court of Claims, or, as to certain small claims by suit in District Courts.

The Comptroller General of the United States is a powerful and distinguished official. However, he is more of an institution than an official. The acts of his office while legally his responsibility are, quite frequently, the concepts of hundreds of assistants, some learned in the law, and some not so clearly imbued with accurate concepts of justice as might be desired.

That occasionally the vagaries of the office of Comptroller General are such as to bring forth caustic comment is regrettably true. Witness the following from the Court of Claims concerning a matter involving $200.65:

> "If this obligation were a large one it would be bad enough. But when it is for an amount so small that

> the value of the time and expense of litigation will eat up its substance, it is indefensible. That a just government, or any responsible official thereof, would pursue a course that would make such action necessary is almost incredible. It is one of those strange things that sometimes appear in the processes of free government." *(Ct. Claims, Belcher, Ex. v. United States, decided June 2, 1941.)*

A basic question here presented is whether such official may exercise a function of the judiciary, and, determine matters of law without review or question save by the antiquated procedure of direct suit against the government of the United States. To require such procedure in a clear case of admitted facts, as here, is to forego a vital function of the judiciary.

Although the Rules of Civil Procedure as promulgated by this Court abolish the writ of mandamus, (Rule 81,(b)), such is the only suggested remedy available for review of the acts of the Comptroller General according to the opinion of the United States Court of Appeals for the District of Columbia as announced in this action. (R. pp. 10-13.) The Solicitor General insists in his brief that we must sue direct either in the District Court or in the Court of Claims.

We prefer to yet believe that this Court on further reflection will grant the writ for which prayer is made, and, thereby encourage the development of improved judicial processes.

The affirmative action of Congress in amending the Declaratory Judgment Act in 1935 by inserting the restrictive words "except with respect to Federal taxes", effectively disposes of any lingering doubts that Congress did not recognize that one of the important uses of this law was the opportunity its provisions afforded the citizen

to speedily and at slight expense question the acts of public officials by appeal to the courts whenever such acts invaded the legitimate province of the judiciary.

This Court has now under review an action brought under the provisions of the Declaratory Judgment Act against the Secretary of Agriculture and others for an appropriate declaration of law. *(Claude R. Wickard, Secretary of Agriculture, et al. v. Filburn, No. 59, October Term, 1942.)*

This Court on October 26, 1942, finally disposed of an action brought against the Administrator of the Wage and Hour Law under the procedure of the Declaratory Judgment Law. *(Walling-Fleming, Administrator v. A. H. Belo Corporation, No. 622, October Term, 1941.)*

In addition to the use of this law and procedure to question the acts of officials of government, it is a procedure employed by the government itself. *(United States v. Golden Gate Bridge and Highway District of California,* 37 Fed. Supp. 595.)

To say that government may use this procedure to determine and "declare rights and other legal relations of any interested party petitioning for such declaration", *(Section 274D of the Judicial Code.)* and, to hold that its provisions may not be invoked to challenge for judicial determination the acts of government officials is, in our opinion, to make sport of a solemn act of Congress, and, to disregard the reasoned judgments of this Court.

It cannot be open to argument that this law was passed by Congress to improve and speed up the administration of justice for the citizen.

This law was appropriately implemented by the Rules of Civil Procedure:

"The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

(Rule 57, Rules of Civil Procedure, 1938.)

It is difficult to perceive a more appropriate remedy than declaratory procedure where it is desired to review the correctness of the act of a public official of government as to his application of a questioned principle of law to an admitted state of facts, or to the application of a correct principle of law misapplied to a given state of facts.

Declaratory procedure is cheap, expeditious, and simple. The United States Court of Appeals for the District of Columbia suggests that it is "clever." (R. p. 13.)

In transmitting to Congress his veto message of December 18, 1940, the President of the United States took occasion to say:

"Forward-looking judges, experienced administrators, and many progressive and public-spirited lawyers have recognized that American jurisprudence must advance along two lines:

"First, the cheapening, expediting, and simplfying of the judicial process itself. This cause has been greatly advanced through the adoption by the Supreme Court of simplified rules governing civil proceedings under an authorization made upon my recommendation." *(H. R. Doc. 986, 76th Cong. 3d Sess.)*

This was a veto message disapproving a measure which might further complicate rather than simplify the right of the citizen to challenge the legality of the acts of public officials and administrative agencies.

Accompanying this message of the President, there was the opinion of the then Attorney General, now Mr. Justice Jackson, who wrote:

"Under the Declaratory Judgment Act of 1934 any person may now obtain a judgment as to the validity of such administrative rules, if he can show such an

> interest and present injury therefrom as to constitute a 'case or controversy'."

It is obvious that the Attorney General in his review of the proposed law regarded the availability of the declaratory action as so apparent and logical when called into action concerning the acts of public officials as to call for no elaboration.

It is equally obvious that the validity of the mentioned opinion of the Attorney General is, of necessity, predicated upon the fact that for the citizen to challenge the act of an official of the government under declaratory procedure is in no wise to be defeated by the assertion that such citizen has brought an action against the United States.

If the declaratory action is available and appropriate as to the validity of administrative rules, as pointed out by the Attorney General, when the mere rules of a governmental agency invade the rights of the citizen, how very much more important is it that this simple, direct, expeditious, and "clever" process shall be at his call in matters affecting his right to have a declaration of his legal rights made by the courts under the law of the land rather than by an administrative official?

The lines of demarcation as between the judiciary and other agencies of government must be kept clear and distinct if our institutions are to be preserved and maintained in their pristine vigor.

In a recent address, Chief Justice Stone is quoted:

> "One of the most important concerns of any judiciary is its right relations with the public. No court can satisfy the public need for faith in the processes of justice, or can function with the highest efficiency without the support of public confidence." *(Journal of the American Judicature Society, October, 1942, p. 78.)*

It was from the sacrifices of patriots, and, from the determined skill and ability of lawyers devoted to the common good that there was developed our revered constitutional system, the preservation of which to its full is entrusted as a sacred heritage to the courts and the bar of the Nation.

Counsel accepts his part of such responsibility, and deems it his duty to present this petition for a rehearing in this cause. We might with appropriate respect quote the words of the aged lawyer Andrew Hamilton, who on the trial of Peter Zengler, regarded by historians as marking the dawn of civil rights in America more than 200 years ago:

> "I agree with Mr. Attorney that government is a sacred thing, but I differ very widely with him when he would insinuate that the just complaints of a number of men who suffer under a bad administration, is libelling that administration."
>
> *(American Bar Assn. Journal, June, 1942, p. 438.)*

I certify that this petition is presented in good faith and not for delay.

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Washington, D. C.,
Counsel for Petitioner.

October, 1942.